Supreme Court, U.S.
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No. 95-1322

In The

Supreme Court of the United States

October Term, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*,
and MELLON MORTGAGE COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT MELLON MORTGAGE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals decision, applying Rule 23(b)(2) to a class action seeking primarily injunctive and equitable relief and concluding that petitioners waived any due process objection by intervening, was correct.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.1, Respondent Mellon Mortgage Company states that it has no subsidiaries except those which are wholly-owned. Respondent's parent company is Mellon Bank, N.A. Mellon Bank, N.A., is a wholly-owned subsidiary of Mellon Bank Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent Mellon Mortgage Company respectfully requests that this Court deny the petition of Michael and Suzanne Crehan for writ of certiorari which seeks review of the opinion issued below in this case by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 64 F.3d 1171 (8th Cir. 1995), included in the appendix at Pet. App. 1a, and the decision of the United States District Court for the District of Minnesota is contained in the appendix at Pet. App. 14a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is included in the appendix at Pet. App. 21a.

STATEMENT OF THE CASE

This is one of many class actions commenced against mortgage lenders alleging that they are overcharging homeowners for tax and insurance escrows. The complaint sought primarily declaratory and injunctive relief in regard to Mellon's escrow practices, including a declaration that its practices are improper, an injunction permanently enjoining Mellon from maintaining escrow accounts with an excessive "cushion," and an order directing Mellon to recalculate each escrow account to ensure that the balance in each account is not excessive. Contrary to these claims, Mellon's escrow practices have historically been accepted by the Department of Housing and Urban Development.

Despite the clear record of injunctive and equitable relief sought, the petition factually misconstrues the case as one primarily pursuing money damages and therefore mistakenly attempts to overturn the district court's proper certification of a mandatory non-opt-out class in connection with a settlement under Federal Rule of Civil Procedure 23(b)(2). In light of petitioners' erroneous premise, combined with their waiver of any constitutional objection, no new questions are presented here: either impacting Rule 23 or due process.

Escrow Practices

Escrow accounts are maintained to allow the servicer to pay taxes, insurance, and other expenses as they become due. Maintaining some cushion enables the servicer to pay off expenses on behalf of the customer as

they accrue without dipping into the servicer's funds if the customer is delinquent in paying.

Mortgage servicers have accounted for escrow balances through either an aggregate or an individual analysis. When aggregate accounting is used, the servicer estimates the balance for the whole account for the year, assuming that the borrower will make monthly payments equal to one-twelfth of the total disbursements. The monthly balances are then adjusted to reflect a lowest monthly trial balance of zero, and the amount of the cushion is then added. 24 C.F.R. § 3500.17(d). When a servicer employs individual-item analysis for its escrow accounts, separate subaccounts are set up for each escrow item. Neither the Federal National Mortgage Association nor the Federal Housing Administration or Veterans Administration mortgage forms has disallowed the use of individual-item analysis. HUD, however, approved a new rule effective May 24, 1995 requiring the use of aggregate accounting analysis. 24 C.F.R. § 3500.17. This rule allows a three-year phase-in period for existing accounts. 24 C.F.R. § 3500.17(b),(c)(4)(i); 60 Fed. Reg. 8812, 8813 (1995).

Procedural History

DeBoer filed her class action against Mellon in Minnesota state court in 1992, alleging a violation of section 10 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609, which sets a ceiling on the amount of allowable cushion, and a number of state law claims. The case sought to enjoin Mellon "from requiring any mortgagor to establish or maintain in an escrow

account an actual cushion in excess of the cushion authorized by the underlying contract or the RESPA ceiling, whichever is less." The suit also sought equitable relief to force Mellon to adjust its escrow accounts to ensure compliance with that standard. In 1993 petitioners, who are both sophisticated attorneys with a $300,000 mortgage, brought a suit against Mellon in the Eastern District of Virginia asserting a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, as well as numerous state law claims.

Following removal of the class action to the federal district court, DeBoer and Mellon negotiated under the supervision of a Magistrate Judge and agreed upon a proposed settlement. The settlement allows Mellon to employ individual-item analysis accounting in determining an estimate of escrow amounts needed to pay items as they come due, with accrual completed in the month prior to disbursement. Mellon is also allowed under the settlement to maintain the maximum cushion allowed by law, regardless of the terms of a customer's mortgage instrument. The settlement requires Mellon to automatically refund excess escrow funds if they total more than $15, pay a class rebate for past charges, and pay $240,000 of the requested $290,000 in attorney's fees. The mandatory refund procedure provides a major benefit to the class and will result in savings in millions of dollars.

All individual suits would be dismissed under the settlement, including any suit by petitioners. The settlement also contained a release intended to prevent any further litigation against Mellon on this matter and specifically mentions petitioners' earlier-pending Fourth Circuit litigation. Prior to the district court's approval of the

settlement, petitioners' Virginia action was dismissed for failing to state a federal cause of action, and during the pendency of this appeal that decision was affirmed by the Fourth Circuit. *Crehan v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994) (table).

In October 1993, the district court preliminarily certified the class for purposes of the settlement and approved the notice of the settlement to be mailed to class members and printed in a national publication. On March 8, 1994 petitioners submitted a 24-page brief together with attached exhibits containing objections to the merits of the settlement, the certification of the class, the adequacy of class representation, the class notice, and their inability to opt-out. On April 12, 1994 petitioners moved to intervene. In May 1994, the district court held a hearing to consider objections. Only five timely objections were filed out of an approximate class of 300,000, including petitioners, and another six individuals timely noted their desire to be excluded from the class. In June 1994, the settlement and attorneys' fees were approved and on July 5, 1994 the court granted petitioners' motion to intervene, allowing them to appeal the settlement.

Petitioners then appealed to the Eighth Circuit Court of Appeals, challenging the substance of the settlement, the propriety of the class action to handle the claims against Mellon, the adequacy of class representation, their inability to opt-out of the class to pursue their individual claims and several other points. The court of appeals upheld the district court's decision that the settlement is reasonable, noting among other things that the plaintiffs did not have a very strong case – they may not have even had a legitimate federal cause of action.

Although not needing to reach the issue in this case, the court of appeals recognized that the Circuits are split on whether section 10 of RESPA creates a private right of action. *See State of Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301-02 (5th Cir. 1995) (no cause of action); *Allison v. Liberty Savings*, 695 F.2d 1086 (7th Cir. 1982) (same). *But see Vega v. First Fed. Savings & Loan Ass'n of Detroit*, 622 F.2d 918, 925 (6th Cir. 1980). In light of this, the court of appeals concluded there was a strong unlikelihood of success and any benefit to the class was better than the prospect of ultimately unsuccessful litigation. Further, as noted in the Eighth Circuit's opinion, the summary affirmance of the dismissal of petitioners' individual claims in the Fourth Circuit reflected the faint chance of success that existed with respect to the RICO and damage claims that petitioners wish had been asserted in this case. According to the court of appeals, the other claims relating to individual-item analysis faced a similarly difficult road given HUD's past acceptance of Mellon's escrow accounting practices. *See GMAC Mortgage Corp. v. Stapleton*, 603 N.E.2d 767 (Ill. Ct. App. 1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993).

In affirming the district court's approval of the reasonableness of the settlement, the court of appeals held from a procedural standpoint that the class was properly certified under Rule 23(b)(2) with no opt-out because class-wide injunctive relief was brought asserting that Mellon "has acted or refused to act on grounds generally applicable to the class." The court of appeals also decided that petitioners had waived any potential due process requirement that would allow them to pursue their claims in another forum by submitting extensive memoranda to

the district court on the issues of the fairness of the settlement and again by reaffirming their position on appeal.

REASONS FOR DENYING THE WRIT

In light of the injunctive and equitable relief sought, this case was properly certified as a class without opt-out according to Rule 23(b)(2). The decision by the Eighth Circuit Court of Appeals was based upon a correct application of Rule 23 to the facts before it, consistent with other courts of appeal, and does not present any new questions regarding Rule 23. Nor does this Court need to reach any potential due process issues because petitioners waived any potential due process objection when they appeared and intervened before the district court and court of appeals.

I. In Light Of The Injunctive Relief Sought, The Class Was Properly Certified Under Rule 23(b)(2) Without Opt-out.

Although petitioners assert that class certification should have been under Rule 23(b)(3) so that they could opt-out of the settlement and pursue their claims individually, the district court and court of appeals properly found the class certifiable under section (b)(2). The district court also certified the class, in the alternative, under section (b)(1) but the court of appeals did not need to address the section (b)(1) certification.

It is well established that when either section (b)(1) or (b)(2) is applicable, section (b)(3) should not be used,

so as to avoid unnecessary inconsistencies and compromises in future litigation. *See Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (discussing (b)(1)); 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1775, at 491 (1986) (discussing (b)(1)); *id.* § 1777, at 521 (noting that "the privilege to opt-out of the action should be operable only when the class is maintainable under [Rule 23(b)(3)] alone"). If the court determines that both sections (b)(2) and (b)(3) apply, then it should treat the suit as having been under section (b)(2) so that all the class members will be bound. *Id.*

In this case, the class sought injunctive and equitable relief against Mellon's alleged over-escrowing practices. Certification under section (b)(2) is appropriate if class-wide injunctive relief is sought when the defendant "has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). Certification under section (b)(2), therefore, was appropriate. *See* Wright, Miller & Kane, *supra*, § 1775, at 470 ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).").

Petitioners' entire argument under Rule 23 is built on the erroneous premise that money damages are "the predominant claim for relief" in this case. The record is clear, however, that the class claims here primarily involved claims of injunctive relief and "[t]he fact that [damages] were sought incidentally to the prayer for relief does not affect this result." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1993). Rather than the injunctive relief in the settlement being a sham as baldly suggested in the petition, the court of

appeals decided that "[i]nterpretation of the contractual obligations is not so cut and dried as the Crehans would have us believe" and "the permanent refunding procedure [contained in the settlement agreement] constitutes a benefit to the class." Pet. App. 12a-13a. Moreover, the primary nature of the injunctive relief sought against the class as a whole in this case is not altered by the district court's proper certification of a class of both current and former Mellon customers, a ruling unchallenged here. *See* Wright, Miller & Kane, *supra*, § 1775, at 463-67 (courts allow rule 23(b)(2) actions involving damages when the primary relief sought is an injunction).

As recognized in numerous other cases, any potential unfairness to petitioners in compromising their claims is "outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975).

A class action is properly certified under Rule 23 (b)(2) in circumstances like this case which involve issues of institutional policy, practice, process and procedure that are generally applicable to all class members. *Gorton v. Johnson*, 100 F.R.D. 801, 803 (E.D. Mich. 1984). Mellon's alleged over-charging for escrow accounts is conduct "generally applicable to the class." In addition, the 24-page settlement agreement sets forth in great detail the standard of conduct Mellon must follow with respect to its escrow criteria and methodology. Mellon's standard of conduct and future escrow practices are mandated by the settlement agreement. To allow opt-outs would expose

Mellon to inconsistencies in future litigation, one of the primary policy reasons behind section (b)(2). *See* 7A Wright, Miller & Kane, *supra*, § 1775, at 491.

Challenges to various policies and practices have been certified under section (b)(2) even though some monetary relief was also sought and obtained. *See Calkins v. Blum*, 511 F. Supp. 1073 (N.D. N.Y. 1981), *aff'd on other grounds*, 675 F.2d 44 (2d Cir. 1982) (class challenging methodology of computing income of medicaid applicants); *Gould v. Sullivan*, 131 F.R.D. 108, 115 (S.D. Ohio 1989) (challenge to under payment of SSI benefits); *Martinez v. Dunlop*, 411 F. Supp. 5 (N.D. Cal. 1976), *aff'd*, 573 F.2d 555 (9th Cir. 1977) (challenge to calculation of employment payments).

Contrary to the petition, the decision here is not inconsistent with the rulings of other courts of appeals. In *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983), the Eleventh Circuit merely recognized that in Title VII employment discrimination cases back pay claims are in some circumstances considered more similar to damages in a (b)(3) class action and thus entitled to opt-out protection. *See also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981); *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975). Unlike this case, these holdings arose from discrimination claims involving primarily money damages as compared to injunctive relief.

Determining the certification of a class action is necessarily within the discretion of the district court and

should only be overturned upon a showing of an abuse of that discretion. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). Its decision here was consistent with other courts of appeals and the petition does not present any new questions regarding Rule 23.

II. Petitioners Waived Any Potential Due Process Objection When They Appeared and Intervened Before The District Court And The Court Of Appeals.

Contrary to the petition, this Court is not presented with any constitutional due process problems in the composition of a mandatory class. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985), the Court left open the question whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief. As the court of appeals recognized, however, the *Shutts* issue is avoided when an objector submits to the court's jurisdiction. *White v. National Football League*, 41 F.2d 402, 407-08 (8th Cir.), *cert. denied*, 115 S. Ct. 2569 (1995). The Court need not decide here whether in a suit seeking equitable relief due process precludes binding an absent class member's subsequent suit for damages because petitioners are not absent plaintiffs in this action. Rather, they were subject to the jurisdiction of the district court.

By intervening and submitting extensive memoranda to the district court on the issues of the fairness of the settlement and again reaffirming their position on appeal, petitioners have waived any potential due process requirement that would allow them to pursue their claims in another forum. *See White*, 41 F.2d at 407-08; *Martin v.*

Drummond Company, Inc., 663 So. 2d 937, 945 (Ala. 1995), *cert. denied*, 64 U.S.L.W. 3588 (1996) (shareholders submitted to the jurisdiction of the court by availing themselves of its statutory appraisal procedure, "thus invoking the benefits and protections of its laws," *quoting from Hanson v. Dencla*, 357 U.S. 235, 253 (1958)).

The district court in this case had the requisite power to exercise personal jurisdiction over petitioners and bind them as long as they had minimum contacts with the forum and they were not otherwise denied due process. *See International Shoe Co. v. Washington*, 326 U.S. 310, 317-18 (1945). This personal jurisdiction requirement is not an Article III restriction on the federal courts, but rather an individual liberty interest flowing from the Due Process Clause. *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Like other such rights, the personal jurisdiction requirement can be waived. *Id.* at 703.

Thus, the district court here need only have provided "notice plus an opportunity to be heard and participate in the litigation" in order to satisfy due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). As recognized in *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n.8 (3rd Cir.), *cert. denied*, 115 S. Ct. 480 (1994), due process protections are sufficient to "bind absent class members who had sufficient minimum contacts with the forum." The teaching of *Shutts* and this Court's other due process jurisprudence is that litigants are bound if they have had minimum contacts with the forum sufficient to create personal jurisdiction.

The district court provided for notice to each class member, including petitioners, containing a full disclosure of the proposed settlement and its ramifications. The notice also informed all class members that a hearing to determine the fairness and reasonableness of the settlement would be scheduled before the district court. The class members were invited to appear at the hearing to present any arguments that may be relevant and proper concerning the settlement. Petitioners did precisely that by intervening and submitting lengthy written memoranda to the district court and later the court of appeals challenging the substance and fairness of the settlement, the propriety of class certification, the adequacy of class representation, the content of the class notice, their inability to opt-out, the amount of attorneys' fees and several other points.

The petition in effect concedes the jurisdictional significance of petitioners' appearance before the district court and court of appeals – by admitting they made a tactical decision to challenge the merits of the settlement in order to avoid a waiver if their opt-out request was denied. Pet. 20. Although the petition characterizes this as a "Hobson's choice" and asks the Court to create a "special appearance" for plaintiffs to assert claims like an affirmative defense under Rule 12(b)(2), *Shutts* makes clear that a class-action plaintiff is in a quite different posture than a defendant. *Shutts*, 472 U.S. at 808-09. As this Court noted in *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940), a class suit is an exception to the general rule that one cannot be bound by a judgment in personam unless one was made a party in the traditional sense. Rather, the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those

interested in the litigation was too great to permit joinder. Even absent parties are bound by the judgment so long as the named parties adequately represented the absent class and pursuit of the litigation is within the common interest. *Id.* This result is even more appropriate in this case where petitioners submitted to the jurisdiction of the district court.

Given that the district court had sufficient jurisdiction to bind petitioners, the release entered into on their behalf is thereby consistent with due process. *See Grimes*, 17 F.3d at 1564 (permissible for the class settlement to preclude later actions relying on different legal theories when those claims arise out of the same operative facts as presented in the settlement).

Despite the attempt in the petition to argue otherwise, this is not a circumstance where an absent class member who does not have minimum contacts with the forum would be enjoined from relitigation in another forum of claims wholly or predominately for money damages. *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *writ dismissed as improvidently granted*, 114 S. Ct. 1359 (1994); *Shutts*, 472 U.S., at 808-12; *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3rd Cir.), *cert. denied*, 493 U.S. 821 (1989). Unlike *Ticor*, *Shutts* and *Real Estate Title*, petitioners have had their day in court to point out the shortcomings of Mellon's practices and of the settlement on the merits, precisely what they requested in their briefs to the district court and court of appeals. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990) (jurisdictional objection waived when arguments go "to the heart of the issue before the district

court"). In addition to petitioners' waiver of any constitutional due process objection by appearing and intervening in this case, those decisions presented a wholly different issue: whether due process requires opt-out rights in every class action where primarily money damages as opposed to injunctive relief are sought.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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